No. 10340

In The United States Circuit Court of Appeals For The Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

PACIFIC FRUIT & PRODUCE COMPANY, a corporation, *Appellee*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

The United States Government, acting through the Farm Security Administration, took a mortgage on the crop of George M. Brisky and Evelyn Brisky, his wife, and upon a large amount of livestock and personal property used in connection with the farm (R. 23-26), for the sum of $770.11. The Government was unwilling to finance the crop and as a result, the Briskys made an arrangement with the Appellee to complete such financing and the Government subordinated its mortgage on the crop to the extent of 60c per box (R. 35, 224-225), which was the estimated amount of

additional financing needed, but specifically retained its lien upon all of the other personal property covered by the mortgage (R. 37). By the terms of the subordination the Appellee was authorized to deduct from the sale price the amount of its advances up to 60c a box and the subordination purported to retain a lien upon the proceeds in excess thereof (R. 36). Thereafter the Appellee did advance 60c a box on the crop and purchased the entire crop. The Appellee on its ledger (Exhibit A) (R. 197-199) charged the Briskys with the amount of the advances and as the fruit was packed, credited the Briskys with the purchase price thereof. The net result, as shown by the ledger sheet (Exhibit A), was that the fruit was of less value than the amount of the advances and Appellee charged off to loss the excess of its advances (R. 199). The crops of the growers listed in the other nineteen causes of action in the plaintiff's complaint were handled in a similar manner.

At the close of the 1937 season, three representatives of the Farm Security Administration, namely, Howard A. Nessen, Regional Collection Adviser, B. R. Phipps, Farm Security Administration District Supervisor, and Henry Waller, came to the plant of the Appellee (R. 90) to ascertain whether or not there was any excess to which the Government was entitled (R. 91, 110). The Appellee made all of its records concerning the crop of these borrowers available to the United States Government and offered to them all the assistance they desired (R. 91, 97, 106, 115).

In January of 1941, the Appellant commenced an action against the Appellee, claiming a conversion of

the fruit of each of these twenty borrowers and prayed for an accounting. This action was only one of fourteen similar suits involving an extremely large number of borrowers in the aggregate.

As a result of the tremendous amount of time it would have taken to have tried the facts of each cause of action set forth in the fourteen cases, it was agreed that a typical cause of action should be selected by counsel in each action, and that the evidence would be submitted upon this one cause of action and the court would in this case make all of the necessary rulings and lay down the formula by which the amount of the recovery, if any, could be computed in the remaining causes of action. Accordingly, cause of action No. 3, involving the fruit of the Briskys was chosen in the instant case and it was upon this cause of action that the case was tried (R. 46).

The Appellant tried its case upon the theory that the Appellant converted the fruit as of the date that the Appellee disposed of the fruit (R. 51) and, except for the small amount of 298 boxes (R. 169), did not present any evidence of the date on which the apples were disposed of by the Appellee, nor did it have any evidence as to the condition or value of the fruit at that time (R.182). No showing whatsoever was made as to the disposition of any of the other property upon which the Appellant had a mortgage. After the Appellant rested, the Appellant moved for a voluntary non-suit of the entire action, without prejudice (R. 184-185). The court refused to grant such motion with-

out prejudice unless Appellant would make a voluntary contribution of $250.00, to reimburse the Appellee (R. 195). Otherwise, he would dismiss it with prejudice (R. 195). Whereupon, on April 29, 1942, the Appellant presented an order to the court dismissing the suit upon the terms indicated and directing the Clerk to return the exhibits to the respective parties (R. 215-216). On July 2, 1942, after the expiration of the forty-five days provided in the court's original order, the Appellant moved for a continuance (R. 218), which was denied, and judgment was entered dismissing the action with prejudice (R. 219).

QUESTIONS INVOLVED

(1) Whether a contract prepared by one party on its own printed forms, with apparent inconsistencies, should be construed in favor of the party not preparing the form and against the party preparing such form.

(2) Whether a party having two items of security for its loan can enforce collection out of one of the items on which a third party has a claim, without first exhausting the other item.

(3) Whether the attorneys for the plaintiff, after resting on the first of twenty similar causes of action, can move the court for a dismissal of the entire twenty causes of action, and whether they, after the court has announced the terms and conditions upon which the action will be dismissed, can present an order to the court for dismissal upon those terms and conditions and include therein a further order for the return of all exhibits filed in the case, and then use such order as

a basis of appeal, claiming such order is reversible error.

(4) Whether a party can claim the refusal to grant a continuance on the ground of surprise is reversible error where the surprise was the inability of the party's own employee to qualify as an expert and the motion for the continuance was not made until more than two months after the trial had closed.

SUMMARY OF ARGUMENT

In addition to answering the argument of the Appellant, the Appellee urges the following reasons why the decision of the District Court should be affirmed.

I.

Any inconsistencies in the subordination agreement should be construed most favorably for the Appellee as it was drawn by the Appellant.

II.

The Appellant must first account for the security other than the crop before resorting to such crop security.

III.

The presentation by the plaintiff of an order dismissing the entire case and directing the return of all exhibits, without first having made a motion for a continuance or reserving exceptions to the court's ruling, precludes the plaintiff from claiming a reversible error for the entry thereof.

IV.

To be entitled to a continuance, the Appellant must show due diligence has been exercised in preparing its

case and the application must be timely made, and failure of Appellant's own employee to qualify as an expert is not justifiable surprise.

ARGUMENT

First: The Appellant in urging that the trial court committed an error, asserts that the Appellee converted 298 boxes of apples and, therefore, the Appellant was entitled to a judgment for nominal damages with costs. Much authority could be assembled to the effect that a mortgagee can bring an action for conversion against a third party who converts mortgaged property, and we have no quarrel with that doctrine. It is, however, not applicable in the instant case. This doctrine is based upon the wrongful seizure of mortgaged property. Here there was no such act. The subordination agreement contemplated the sale of this fruit to or through the Appellee. The subordination provides

> "said Mortgagor is in need of additional funds for the purpose of * * * *marketing his fruit crop* and has applied to Pac. Fruit & Produce Co. Cashmere hereinafter called the Creditor for a loan for any or all of these purposes" (R. 36).
>
> "* * * on *all fruit sold by the Mortgagor*, and does specifically agree that *the Creditor shall have the right to deduct* and receive from all *sales made by the said Mortgagor* * * * " (R. 37).
>
> "* * * the United States of America * * * shall have a *lien on all proceeds* * * * *after the deduction* of Sixty ($.60) Cents per box from the proceeds of such sale has been made *by the Creditor*" (R. 37). (Italics ours.)

All that the Government retained was a right for an ac-

counting, as the subordination clearly gave a right to sell, and where there is a right to sell there can be no conversion for selling. Conversion contemplates a wrongful act.[1] It is therefore respectfully submitted that the Appellee did not and could not convert the 298 boxes of apples.

It was the position of the Appellant throughout the entire trial that the Appellee converted the fruit at the time it disposed of the same and that the Appellant could recover the value of the fruit as of that date, less 60c per box. The Appellant acknowledged that it had no evidence to offer relative to the value of the fruit at the time it contended the conversion took place (R. 182, 184). Assuming that a conversion was possible, then the conversion must have been the proceeds in excess of 60c a box as that is what the Government attempted to retain a lien on and there is no evidence that such an excess ever existed.

It will be noted that the subordination agreement (R. 37) provides, "* * * that such subordination shall be limited to the extent of 60c per box *on all fruit sold by the mortgagor* * * *", and again, that the Appellant "* * * shall have a *first lien on the proceeds* from each and every sale * * *" (Italics ours.)

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[1] 26 R. C. L. 1098

"Conversion Defined.

Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein, such as a tortious taking of another's chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of the possession, permanently or for an indefinite time. The act must be essentially tortious."

It was the contention of the Appellant that all apples that sold for less than 60c per box was the Appellee's loss, and all apples that sold above 60c was the Appellant's profit. It was and is the contention of the Appellee that when the Appellant subordinated its mortgage to the extent of 60c per box on all fruit, that that gave the Appellant the right to recover his advances before making any accounting to the Appellant, providing his advances were limited to 60c per box. It is a matter of common knowledge that all fruit will not grade the same and is, of course, a physical impossibility to advance up to 60c for spraying and harvesting a crop on the apples that are going to grade high enough to demand in excess of 60c, and lesser amounts according to what the apples will grade, and if the Appellant's contention is to be upheld, it simply would mean that no creditor could advance a sum greater than what the lowest quality fruit would produce. Otherwise, they must inevitably suffer a loss with no prospects whatsoever of profit. If the Appellant's contention is to be sustained, these two clauses

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[2] 12 Am. Jur. 795:

"Doubtful language in contracts should be interpreted most strongly against the party who uses it."

Mikusch v. Beeman, 110 *Wash.* 658; 188 Pac. 780:

"The language employed in the contract being that of defendants, it should be construed more strongly against them than against plaintiffs. 6 R.C.L. 854."

E. I. DuPont de Nemours & Co. v. Claiborne-Reno Co. (*CCA* 8), 64 Fed. (2d) 224, 89 A.L.R. 238, writ of certiorari denied in 290 U.S. 646, 78 L. ed. 561; 54 S. Ct. 64:

"The language of a contract will be construed most strongly against the party preparing it."

are not consistent, and under the well-recognized doctrine that any inconsistencies are to be construed against the party preparing the contract,[2] the Appellant's contention must be rejected and it must be held that the Appellee is entitled to the entire proceeds up to the amount of their total advances. Exhibit A shows that it was necessary for the Appellee to actually charge off a portion of its advances as the fruit did not sell for enough to reimburse the Appellee (R. 199).

Second: The Appellant throughout its brief, keeps reiterating that the judgment in this case has prevented the Appellant from collecting practically $20,000.00 justly due it, this being the total amount the Appellant loaned to the debtors involved in the twenty causes of action against the Appellee. This is not the fact. The Appellee does not owe that $20,000.00 to the Appellant and never has owed it. All that the Appellee was required to pay under the terms of the subordination agreement was the value of the fruit less its advances and Exhibit A (R. 199) shows Appellee did not even get back its advances. It must be remembered that this was a 1937 apple crop which was completed in the spring of 1938 and the Appellant had three of its representatives examining the books of the Appellee and yet no action was taken to enforce any such collection until January, 1941. The chattel mortgage which the Appellant had covers not only this crop but what appears to be some very substantial security (R. 23), and if the Appellant was as desirous of collecting the moneys due to the Government as it would have the court

believe, the whole or substantial portion could be collected, but so far as a record is concerned there is nothing to show that the Appellant has made the slightest effort to collect this money other than to bring this belated action against the Appellee. It is also a matter of common knowledge that the fruit growers are making substantial profits, and if the Appellant wishes to collect its money, it can no doubt do so.

Assuming but not admitting, that the Appellant's position is correct, we find a situation where the Appellee has only one source from which it can recover the advances made to the grower in order to enable him to market his fruit, namely, from the fruit, whereas the Appellant has two sources from which it can collect its money, one from the personal property mortgaged, other than the crop, and second, from the excess above the 60c. We believe it to be a uniform doctrine that where a debtor has two credtiors, and one of the creditors has two sources from which it can collect its debt, and the other creditor has only one of them, that the creditor having the two sources must first exhaust the security not available to the less favorable creditor, and only take the security to which the less favorable creditor is entitled for any excess of the debt.[3] We are, therefore, respectfully submitting that the Appellant was required to account for the

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[3] *Solicitors Loan & Trust Co. v. Washington & Idaho R. R. Co.,* 11 Wash. 684; 40 Pac. 344:

Mortgagor conveyed part of his property and the court in holding that it must sell the mortgaged property in parcels, selling what mort-

value of the security which it held before taking from the Appellee its only security for its indebtedness.

Third: Appellant further complains that the court dismissed the entire action with prejudice instead of

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gagor still retained first, quoted from an Illinois case saying,

> "* * * This protects the interest of the purchaser of the part, and makes the mortgagor but pay his own debt out of his own land."

Schaad v. Robinson, 50 Wash. 283; 97 Pac. 104; 59 Wash. 346; 109 Pac. 1072:

The mortgagee released a portion of the land for less than its value after other parties had acquired a lien on the unreleased portion. The Court provided that the liens of these third parties must be paid out of the proceeds of the sale before any application could be made on the mortgage debt.

Cobbey on "Chattel Mortgages" Sec. 991: "Where a part of the property mortgaged is subject to other liens the court may in the interest of such lienholders, require the mortgage to exhaust the property upon which he has the sole lien first if such requirement will not injure the mortgagee."

"When mortgages, held by senior and junior incumbrances, cover in part the same property, and the mortgagor is insolvent and the entire property is sufficient to pay both debts, the junior mortgagee may compel the senior mortgagee to exhaust the fund on which he alone held a lien, before resorting to that one covered by both mortgages."

Jones on "Mortgages," Sec. 897: "The holder of a junior mortgage upon one of two lots embraced in a prior mortgage may compel the prior mortgagee to resort in the first place to the other lot, upon which there is no other incumbrances."

"If the junior mortgage covers only a portion of the lands embraced in the senior mortgage, and the senior mortgagee released from his mortgage, that portion of the property not covered by the junior mortgage, he will not be permitted to enforce his security against the premises common to both mortgagees unless he will first deduct the value of the parcel so released."

Overton on "The Law of Liens," Sec. 11: "Where a lien is common to two or more creditors and one of the creditors has a lien on separate property, equity will require the separate lien to be enforced first."

either dismissing it without prejudice or granting a continuance. Unfortunately for the Appellant's contention, the Appellant after resting, moved the court to dismiss the entire action and did not ask for a continuance. At the conclusion of the argument thereon, the court made a conditional dismissal of the suit, and the attorneys for the Appellant presented the order for such dismissal. This order further provided for the return of the exhibits to the respective parties. The portion of the order providing for the return of the exhibits is a definite acquiescence in the disposition made by the court at the time, and precluded any idea or thought of the renewal of the instant action, and it was not until after the time limit on the court's preliminary dismissal had expired, so that only a final order was necessary to clear the records, that the motion for a continuance was ever presented to the court. We do not believe that the Appellant's attorneys should be permitted to lead the court into a reversible error, and if the entry of that order is a reversible error, which we do not concede, then it must be held that the attorneys for the Appellant invited the error and cannot now take advantage of it, nor was the motion for continuance timely.

Fourth: Appellant contends that the court imposed costs against the Government when the Appellant is immune from costs. The court did not impose any costs against the Appellant and no judgment for costs was rendered against the Appellant at the time of the preliminary order, or now. The Appellant's motion is

under *Rule* 41 *of the Rules of Civil Procedure,* and is directed to the sound discretion of the court, and by the terms of that rule, the court is authorized to impose such terms and conditions as the court deems proper. The upholding of the contention of the Appellant that the court is without authority to impose terms on the Government as a condition precedent to granting a dismissal without prejudice, will not be a doctrine favorable to the Government. The announcement of such a rule would merely be to encourage trial courts to dismiss suits with prejudice under similar circumstances, and that would have been the result in this case as the trial court said "I wouldn't consider granting the motion without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn't start another law suit unless the Government has paid something" (R. 186). The reason that prompted the rule against permitting plaintiffs from dismissing suit without prejudice without the order of the court, and then only on such terms and conditions as the court deemed proper, is to compel the plaintiff to adequately prepare the case so that a defendant is not put to needless expense, (cases cited by trial court R. 188) and the record in the instant case shows from its very inception a total inexcusable lack of preparation on the part of the Appellant.

In the spring of 1938 at the close of the 1937 apple season, three officials or employees of the Resettlement Administration, went to the Appellee's warehouse for the supposed purpose of ascertaining whether the Gov-

ernment was entitled to any of the proceeds of the mortgagor's crop. At that time, all of the records concerning the receipt and disposition of fruit were made available to the Appellant's representatives. The three representatives were all present at the trial, and testified and unanimously agreed that the Appellee furnished them every facility to make a thorough and complete investigation.[4] If they did not do so, that is the Appellant's negligence, not the Appellee's.

Concerning the preparation of the case, the trial court said:

> "You can't make a demand like this binding on anybody. You can't issue a subpoena saying. 'bring in all your records.' There is some responsibility on people starting law suits to know what they want. I will refuse the demand on the ground it wasn't made timely" (R. 169).
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> "It seems to me with all the facilities of the United States Government in preparing this case for trial over a period of two or three years they could have gotten somebody in Wenatchee qualified to testify from his knowledge what the market price was at that time. When you get down to it all this witness has testified is what he has taken off these reports." (R. 179.)

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[4] 12 Am. Jur. 454:

> "* * * a party who might have been prepared for trial will very seldom be granted a continuance because he is not prepared, and certainly in such a case the exercise of the court's discretion will not be disturbed."

12 Am. Jur. 469:

> "The rule is practically universal that a continuance will not be granted to enable a party to obtain the testimony of an absent witness unless it appears that the applicant has used due diligence to procure the attendance of such witness or to obtain his testimony."

"I wouldn't consider granting the motion without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn't start another law suit until the Government has paid something—" (R. 186).

"This case has been pending a long time. It should have been prepared. The defendant has been put to the expense, and should not have been put to the expense. Now the rule is the Government is not responsible for costs, and there is no way the Government can be compelled to pay costs in the ordinary sense of the word. These young men went out to examine the books, and did not examine the books." (R. 192.)

"With all the facilities the Government has at its disposal and all the people in the Wenatchee Valley competent to testify as to market values, it certainly isn't justifiable for the Government to come in with one witness and say 'I'm sorry but we can't prove it and therefore give us a voluntary dismissal and we'll start all over again' and put the defendant to the expense of preparing it again. I will say, frankly, if this case is started again, and the trial starts out the same way this has, without any preparation it just isn't going to trial." (R. 193.)

B. R. Phipps, one of these representatives testified that it was his duty during the progress of the season to keep a check to see that the growers were receiving proper return on their fruit, and he was acquainted with what Appellee was paying during the course of the season (R. 130-131), yet there is not a hint of any protest to the method of accounting of the Appellee, nor to the way its records were kept or any other matter concerning the marketing of fruit. Were the Appellant a private industry, every court would hold that

it was estopped from now challenging the acts of the Appellee. The records show that from five to six hundred carloads of applies annually pass through this one warehouse and the records thereof are most voluminous. At the close of the season when ordinary business would have called for the adjustment of an account, these records were available, and when three representatives of the department check Appellee's books, we submit that Appellee was entitled to assume that Appellant got the data it desired.

In 1941 the Government commenced suit and for the first time challenged the whole method of handling the transaction. The case did not come on for trial until more than a year after the complaint was filed. The plaintiff made no effort to obtain the information necessary to support the allegations of its complaint. The case was set for trial on Tuesday, April 28, 1942, in Spokane, Washington, some 130 miles from the warehouse of the Appellee. The Saturday evening preceding the trial, a subpoena duces tecum requiring the Appellee to bring to court all of its records concerning the fruit acquired from the Briskys was served. It was a physical impossibility to comply with the terms of the subpoena, and when counsel for the Appellant made a demand in open court for the compliance of the subpoena, the court denied the demand upon the ground that the service of the subpoena was not timely (R. 169).

The Appellant, even though it based its entire theory upon its right to recover upon the market value of apples at a particular time, did not have any witnesses available who were competent to so testify. The only

witness who was brought for that purpose was one of the three representatives who was supposed to have audited the Appellee's books. He has been associated with that department of the Government in direct connection with the financing of the orchards in the Wenatchee Valley from the very inception of the Government's program. The Government should have known whether the witness was qualified to testify upon the point on which its entire case rested, and without which testimony the Appellant's case must necessarily fail. In the immediate vicinity, there are innumerable numbers of available witnesses who could have qualified as experts, and the Appellant had no right to come into court with only one of its own employees who, as it developed, had no qualifications at all, and then say they were surprised. That is not justifiable surprise; it is plain lack of preparation.

CONCLUSION

It is respectfully submitted that this cause must be affirmed for the reasons (1) that Appellant wholly failed to produce any evidence entitling it to recover; (2) that the Appellant wholly failed to show any justifiable reason why it could not have produced evidence at the trial, if such evidence existed, entitling the Appellant to recover, and (3) if it should be held that the trial court committed any error in the dismissal of said case, such error was invited by the Appellant.

Respectfully submitted,
RYAN, ASKREN & MATHEWSON
HOWARD W. SANDERS
Attorneys for Appellee.
545 Henry Building
Seattle, Wash.